

1 IN THE SUPREME COURT FOR THE STATE OF ALASKA

2 RESOURCE DEVELOPMENT COUNCIL)
3 FOR ALASKA, INC.; ALASKA TRUCKING)
4 ASSOCIATION, INC.; ALASKA MINERS)
5 ASSOCIATION, INC.; ASSOCIATED)
6 GENERAL CONTRACTORS OF ALASKA;)
7 ALASKA CHAMBER; and ALASKA)
8 SUPPORT INDUSTRY ALLIANCE,)

9 Appellants,)

10 v.)

11 KEVIN MEYER, in his official capacity,)
12 as Lt. Governor of the State of Alaska;)
13 GAIL FENUMIAI, in her capacity as Director)
14 of the Alaska Division of Elections; the)
15 STATE OF ALASKA, DIVISION OF)
16 ELECTIONS; and VOTE YES FOR)
17 ALASKA'S FAIR SHARE,)

18 Appellees.)

Supreme Court No. S-17834

19 Trial Court Case No. 3AN-20-05901CI

20 **MOTION TO UNSEAL SUMMARY JUDGMENT BRIEFING**

21 **I. INTRODUCTION**

22 Appellants (who were Plaintiffs below and hereinafter collectively "Resource
23 Development Council") move this Court, pursuant to Appellate Rule 503 and
24 Administrative Rule 37.5, to unseal Plaintiffs' Motion for Summary Judgment located
25 at R. 000516, Defendant Vote Yes for Alaska's Fair Share's Opposition located at R.
26 000518, and Plaintiffs' Reply located at R. 000521. These filings were made under seal
by the parties below, pursuant to Protective Order which allowed a party producing
discovery to unilaterally designate documents as "confidential," thereby requiring them

1 to be filed under seal unless a party successfully challenged the designation.
2 Unfortunately, because the proceedings below were lightning fast, the superior court
3 did not rule on Resource Development Council's ripe motion to unseal these records
4 prior to this appeal. Pursuant to Administrative Rule 37.5 and this Court's repeated
5 recognition of the strong presumption that court records are public records, this Court
6 should unseal these filings.
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8 In the Motion for Summary Judgment currently under seal, Resource
9 Development Council demonstrated with undisputed evidence that every one of the 24
10 circulators paid by Advanced Micro Targeting, Inc. ("AMT") received compensation
11 in excess of \$1 for every signature they collected. The payment to AMT circulators
12 ranged between \$1.79 and \$68.72 for each signature gathered.¹ These payments exceed
13 Alaska's limit on circulator payment contained in AS 15.45.110(c). Moreover, the
14 Motion for Summary Judgment currently under seal demonstrates with undisputed
15 evidence that every one of these AMT circulators falsely certified compliance with AS
16 15.45.110(c)'s cap on circulator payment on their Certification Affidavits submitted
17 with each petition booklet.²
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21 Resource Development Council requests this Court order Plaintiffs' Motion for
22 Summary Judgment unsealed pursuant to Administrative Rule 37.5, as well as Fair
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25 ¹ See R. 000516 at **Exhibit E** (spreadsheet entitled "Circulator Payment Per
Signature).

26 ² See R. 000516 at **Exhibit A** (all Certification Affidavits submitted by circulators
gathering signatures in support of the 19OGTX initiative).

1 Share's Opposition and Resource Development Council's Reply to that motion. This
2 result will allow the Court to review the actual evidence in this case of circulator
3 payment and their certifications, the parties to openly discuss this evidence at the
4 upcoming oral argument, and to vindicate the public's right to access the evidence in
5 this case.
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7 **II. FACTUAL AND PROCEDURAL BACKGROUND**

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9 On June 25, 2020, the superior court issued the Protective Order that permitted
10 the parties to unilaterally designate documents produced in discovery as confidential to
11 facilitate the discovery process.³ Advanced Micro Targeting, Inc. ("AMT") and
12 Defendant Vote Yes for Alaska's Fair Share ("Fair Share") produced documents
13 showing how much Fair Share paid companies and how much AMT paid circulators to
14 gather signatures of Alaskans in support of placing the 19OGTX initiative on the
15 general election ballot.⁴ On July 6, Resource Development Council filed a Motion for
16 Summary Judgment. This motion for summary judgment was filed under seal because
17 it discussed and contained exhibits of the information marked "confidential" in
18 discovery by AMT and Fair Share. Also on July 6, 2020, Resource Development
19 Council filed a Motion to Unseal the Motion for Summary Judgment, and a Motion for
20 Expedited Consideration of Plaintiffs' Motion to Unseal.
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25 ³ R. 000156-000165

26 ⁴ See R. 000516 at **Exhibit D** (payment of AMT circulators produced in discovery by AMT) (Under Seal with Appellate Clerk).

1 All of these motions were ripe in the superior court,⁵ as Fair Share filed
2 oppositions to them and Resource Development Council filed replies. But the superior
3 court never ruled on the request to unseal the summary judgment filings because it
4 granted Fair Share's motion to dismiss, holding that AS 15.45.110(c) was
5 unconstitutional.⁶ As Resource Development Council will demonstrate in its merits
6 briefing, the superior court's ruling that AS 15.45.110(c) is unconstitutional is fatally
7 flawed and must be reversed. Resource Development Council asks this Court to review
8 and make available to the public the uncontroverted evidence that Fair Share violated
9 Alaska's cap on circulator payment in AS 15.45.110(c) by unsealing the underlying
10 motion for summary judgment and all briefing on that motion.
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13 This Court should order the motion and the underlying documents unsealed
14 because the documents marked "confidential" are quintessential documents the public
15 has a right to access under Alaska law. Fair Share and AMT are not protecting any
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19 ⁵ **Motion for Summary Judgment:** The opening brief to Resource Development
20 Council's Motion for Summary Judgment is located at R. 000516, Fair Share's
21 Opposition is located at R. 000518, and Resource Development Council's Reply is
22 located at R. 000521.

23 **Motion to Unseal:** The opening brief to the Motion to Unseal is located at R.
24 000048-000057, Fair Share's Opposition is located at R. 00039-000044, and the Reply
25 is at 00032-00038.

26 **Motion for Expedited Consideration:** The opening brief to the Motion for
Expedited Consideration is at R. 000127-000132, Fair Share's Opposition is at R.
000114-000118, and the Reply is at R. 000100-000105.

⁶ R. 000071-000072 ("The Court agrees with the Plaintiffs' statutory interpretation
of the signature payment statute, AS 15.45.110(c), but the statute is constitutionally
flawed and therefore invalid.").

1 valid trade secrets or other confidences, but instead are trying to hide their illegality
2 from public scrutiny.

3 Resource Development Council respectfully requests this Court grant this
4 motion and hold that Plaintiffs' Motion for Summary Judgment and all attendant
5 briefing is unsealed, and that the public has a right to access the documents showing
6 how much Fair Share paid signature companies, and how much AMT paid circulators
7 to gather signatures.
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10 This case is on a truncated timetable. On May 26, 2020, the superior court
11 approved of certain discovery Resource Development Council desired to propound to
12 Fair Share and AMT.⁷ The same day, Resource Development Council propounded the
13 approved discovery on Fair Share, and began working diligently to serve discovery on
14 AMT in Nevada. Three days prior to Fair Share's June 26, 2020 deadline to produce
15 responsive discovery, counsel for Fair Share circulated a Proposed Protective Order,
16 which included the standard terms, including each party's ability to unilaterally
17 designate documents as "confidential" and a process to resolve disputes as to whether
18 documents should be confidential or available to the public.⁸ In discovery, Fair Share
19 produced contracts between Fair Share and Texas Petition Strategies, LLC.⁹ These
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25 ⁷ R. 000209-000213.

26 ⁸ See Protective Order at 3, 8-9 (Sections 2.2 and 6) located at R. 000156-000165.

⁹ See R. 000516 at **Exhibits H, I and J**.

1 contracts show how much Fair Share agreed to compensate Texas Petition Strategies,
2 LLC to obtain signatures in support of the 19OGTX initiative.

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4 In response to a subpoena, AMT produced the contract showing how much
5 Texas Petition Strategies agreed to pay AMT to gather signatures in support of the
6 19OGTX initiative.¹⁰ AMT also produced contracts between AMT and individuals
7 who agreed to circulate the 19OGTX petitions and collect signatures in support of the
8 initiative.¹¹ AMT also produced spreadsheets showing how much each AMT circulator
9 was paid each pay period to gather signatures.¹²
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11 **III. DISCUSSION**

12 There is a strong presumption in the law that court proceedings and judicial
13 documents should be available to the public. As the U.S. Supreme Court has stated:
14 “It is clear that the courts of this country recognize a general right to inspect and copy
15 public records and documents, including judicial records and documents.”¹³ This
16 common law creates a “strong presumption in favor of access.”¹⁴ “Federal appellate
17 courts have uniformly concluded that this common law right extends to both criminal
18 and civil cases.”¹⁵ “[A]ccess is particularly appropriate when the subject matter of the
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22 ¹⁰ See R. 000516 at **Exhibit G**.

23 ¹¹ See R. 000516 at **Exhibit F**.

24 ¹² See R. 000516 at **Exhibit D**.

25 ¹³ *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

26 ¹⁴ *San Jose Mercury News v. United States District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999).

¹⁵ *Id.*

1 litigation is of especial public interest.”¹⁶ In *Richmond Newspapers v. Virginia*,¹⁷ the
2 Court noted that the presumption of openness that traditionally has attached to court
3 proceedings in this country “is no quirk of history; rather, it has long been recognized
4 as an indispensable attribute of an Anglo-American trial.”¹⁸ This time-honored practice
5 is also supported by sound policy considerations. Open judicial proceedings are
6 essential to self-government. As the U.S. Supreme Court emphasized in *Globe*
7 *Newspaper Co. v. Superior Court*,¹⁹ access “enhances the quality and safeguards the
8 integrity of the factfinding process, with benefits to [litigants] and to society as a
9 whole.”²⁰ Furthermore, access promotes public confidence in our judicial system by
10 assuring the public “that established procedures are being followed and that deviations
11 will become known.”²¹

12 Alaska law is committed to ensuring broad public access to judicial records.²²
13 This strong presumption is enshrined in Alaska Administrative Rule 37.5, which
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18 ¹⁶ *Welsh v. City and County of San Francisco*, 887 F. Supp. 1293, 1297 (N.D. Cal.
19 1995); *see also Doe v. Marsalis*, 202 F.R.D. 233, 239 (N.D. Ill. 2001) (court documents
20 presumed public “especially when they concern matters of general concern to the
21 workings of our democratic society.”).

22 ¹⁷ *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

23 ¹⁸ *Id.* at 569.

24 ¹⁹ *Globe Newspaper Co. v. Superior Court, County of Norfolk*, 457 U.S. 596, 603
25 (1982).

26 ²⁰ *Id.* at 606.

²¹ *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464
U.S. 501, 508 (1984).

²² *See Johnson v. State*, 50 P.3d 404, 405-06 (Alaska App. 2002).

1 provides that “[a]ll public records within the Alaska Court System shall be open to
2 inspection by any member of the public” and which defines such records to include any
3 “document or item filed with the Alaska Court System which contains information
4 relating to the conduct of the public’s business.”

6 In *State v. Eli Lilly and Co.*,²³ Superior Court Judge Rindner was tasked with
7 weighing a news company’s request for documents filed under seal in litigation
8 pursuant to a stipulated protective order. Judge Rindner recognized the benefit to all
9 litigants of courts issuing protective orders that allowed all parties to litigation to
10 “unilaterally designate documents as confidential” because it “facilitates the discovery
11 process.”²⁴ He also recognized the importance of the right to challenge those
12 designations once discovery was exchanged: “However, to satisfy Alaska’s mandate
13 that court records be accessible by the public, the unilateral designation of documents
14 filed in courts as confidential, even if pursuant to a blanket protective order, without a
15 finding of good cause or that a legitimate interest in confidentiality outweigh the public
16 interest in disclosure, must be reviewed when the public seeks to unseal specific
17 records.”²⁵

21 Judge Rindner noted that “Alaska law regarding Rule 26(c) protective orders is
22 extremely limited. . . .” but that “the Alaska Supreme Court has repeatedly found federal
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25 ²³ *State v. Eli Lilly and Co.*, 2008 WL 5377159 (Alaska Sup. Ct. 2008).

26 ²⁴ *Id.*

²⁵ *Id.*

1 authorities to be persuasive when interpreting the Alaska rule.”²⁶ Therefore, to perform
2 the task of weighing any legitimate interest in confidentiality against the public’s right
3 of access, he turned to the Ninth Circuit’s approach in *Kamakana v. City and County of*
4 *Honolulu*.²⁷

6 In that case, the Ninth Circuit surveyed caselaw and concluded “[u]nless a
7 particular court record is one ‘traditionally kept secret’ a ‘strong presumption in favor
8 of access’ is the starting point.”²⁸ “A party seeking to seal a judicial record then bears
9 the burden of overcoming this strong presumption by meeting the ‘compelling reasons’
10 standard.”²⁹ That is, “the party must articulate compelling reasons supported by
11 specific factual findings that outweigh the general history of access and the public
12 policies favoring disclosure, such as the public interest in understanding the judicial
13 process.”³⁰ After considering these interests, “if the court decides to seal certain
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19 ²⁶ *Id.*

20 ²⁷ *Id.* (citing *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir.
21 2006)).

22 ²⁸ *Kamakana*, 447 F.3d at 1178 (quoting *Foltz v. State Farm Mutual Ins. Co.*, 331
23 F.3d 1122, 1135 (9th Cir. 2003) in turn citing *Hagestad v. Tragesser*, 49 F.3d 1430,
24 1434 (9th Cir. 1995)). The *Kamakana* court explained that two categories of documents
25 fall into the category of “traditionally been kept secret”: “grand jury transcripts and
26 warrant materials in the midst of a pre-indictment investigation.” *Id.* (citing *Times*
Mirror Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989)).

²⁹ *Kamakana*, 447 F.3d at 1178 (citing *Foltz*, 331 F.3d at 1135).

³⁰ *Id.* at 1178-79 (internal quotation marks, brackets and citations omitted for
clarity).

1 judicial records, it must base its decision on a compelling reason and articulate the
2 factual basis for its ruling, without relying on hypothesis or conjecture.”³¹

3 “In general, ‘compelling reasons’ sufficient to outweigh the public’s interest in
4 disclosure and justify sealing court records exist when such ‘court files might have
5 become a vehicle for improper purposes,’ such as the use of records to gratify private
6 spite, promote public scandal, circulate libelous statements, or release trade secrets.”³²
7 The fact that the unsealed records may lead to a “litigant’s embarrassment,
8 incrimination, or exposure to further litigation will not, without more, compel the court
9 to seal its records.”³³ This standard applies with full force to “dispositive pleadings,
10 including motions for summary judgment and related attachments.”³⁴

11 Here, Resource Development Council asks the Court to unseal its Motion for
12 Summary Judgment dated July 6, 2020, so that the public has access to **Exhibits D, F,**
13 **G, H, I and J** to that motion, as well as discussion of that evidence in the motion for
14 summary judgment. Resource Development Council’s motion to unseal below was ripe
15 but not adjudicated because of the lightning fast proceedings to get this matter before
16 this Court. This case is about whether Fair Share and its contractors (Texas Petition
17 Strategies, LLC and AMT) violated Alaska’s statutory limitation on the payment of
18 circulators. Plaintiffs’ Motion for Summary Judgment shows how much AMT agreed
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24 ³¹ *Id.* at 1179 (internal quotation marks and citations omitted for clarity).

25 ³² *Id.* (quoting *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978)).

26 ³³ *Kamakana*, 447 F.3d at 1179.

³⁴ *Id.*

1 to pay and how much AMT-paid circulators were compensated to gather signatures.
2 **Exhibits D, F, G, H, I and J** to Plaintiffs’ Motion for Summary Judgment are critical
3 to resolution of this case, and the public has the right to access them. There are no
4 “compelling reasons” to keep this information secret from the public that overcomes
5 the ““strong presumption in favor of access’” recognized by the Ninth Circuit.³⁵

7 Fair Share may argue that how much circulators are paid and how much Fair
8 Share paid Texas Petition Strategies, LLC and AMT are protectable trade secrets or
9 confidential or proprietary corporate information, but this information is already in the
10 public domain in different forms. Fair Share is required to report all purchases of
11 services, including those to Texas Petition Strategies, LLC and AMT, to the Alaska
12 Public Offices Commission (“APOC”).³⁶ The amount AMT paid its circulators was
13 also put into the public domain by AMT. As noted in Plaintiffs’ Complaint, AMT
14 advertised an offer to pay signature gathers “\$3,500 - \$4,000 per month plus bonus, and
15 that it expected 80-100 signatures per day, six days a week in return for such
16 compensation.”³⁷ This Court should not countenance any attempt by Fair Share to
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21 ³⁵ *Id.* at 1178 (quoting *Foltz v. State Farm Mutual Ins. Co.*, 331 F.3d 1122, 1135
22 (9th Cir. 2003) in turn citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.
23 1995)). The *Kamakana* court explained that two categories of documents fall into the
24 category of “traditionally been kept secret”: “grand jury transcripts and warrant
materials in the midst of a pre-indictment investigation.” *Id.* (citing *Times Mirror Co.*
v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989)).

25 ³⁶ AS 15.13.040(b)(3) (requiring each group to report all expenditures made to
APOC). AS 15.13.400(8)(C) defines “group” to include ballot groups like Fair Share.

26 ³⁷ Plaintiffs’ Complaint for Injunctive and Declaratory Relief, ¶ 22 (April 10, 2020)
(R. 000027).


1 classify its contractual agreements with the professional petition companies as trade
2 secrets when it is legally required to publicly report those amounts to a state agency.
3 Nor should it countenance any attempt to classify AMT's payments to signature
4 gatherers as trade secrets when AMT publicly advertised circulator pay. Information
5 publicly reported to a state agency and advertised are not trade secrets.
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7 **IV. CONCLUSION**

8 Resource Development Council respectfully requests that this Court, in
9 accordance with the Protective Order and Administrative Rule 37.5, unseal Plaintiffs'
10 Motion for Summary Judgment dated July 6, 2020, and the attachments thereto, as well
11 as Fair Share's Opposition to that Motion, and Plaintiffs' Reply. If this motion is
12 granted, Resource Development Council will create a supplemental excerpt of record
13 to provide the Court with the portions Resource Development Council primarily relies
14 upon.
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17 DATED at Anchorage, Alaska this 3th day of August, 2020

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